15AF—REVIEW OF THE STAFF JUDGE ADVOCATE

UNITED STATES

v.

AIRMAN THIRD CLASS JAMES R. GOSA
10 March 1967

1. EVIDENCE.

a. For the Prosecution

On 13 August 1966, Shirley Ann Borden, age 20, was living at 2114 Russell Street in Cheyenne, Wyoming. That evening she had been visiting at Ed Loetcher's house. She left there and started home at approximately 11:30 in the evening. As she was walking along Van Lennen near 22d Street, she was approached and grabbed around the neck by a man later identified as the accused. Miss Borden was told by the accused not to scream or he would kill her. The accused then dragged Miss Borden to an alley, behind a garage, and raped her. The lighting was sufficient for Miss Borden to get a good look at the accused. Miss Borden had screamed before the accused started choking her, and she stopped screaming because she was in fear of her life. Miss Borden noted that the accused had on white boxer shorts and she was sure that there was actual penetration. After the act of sexual intercourse had occurred, the accused got up and left. Miss Borden got dressed and on walking out of the alley saw some patrolmen. She told them "I was just raped". She had some scratches on her knees and a nosebleed. After Miss Borden was taken to the hospital for a physical examination, she was taken to the police station where she identified the accused. The identification was made by the accused's clothing. He had on a maroon corduroy jacket and grey slacks (R. 14-18). After the accused had pushed Miss Borden to the ground, he started taking off her shorts and her underpants. After he had "got in a little ways," she remembered that she was wearing Tampax and he took it out. The accused was choking Miss Borden so as to cut off her

wind and she was having trouble getting her breath (R. 26, 28). Miss Borden's shorts were taken off by the accused and there was penetration both prior to and subsequent to the removal of the Tampax. Miss Borden had never seen the accused prior to the night of August 13, 1966. In addition to the street light there were lights on in a house nearby and there was a bright moon (R. 31-34).

Curtis J. Renfro is a patrolman in the Cheyenne Police Department. Just prior to midnight on 13 August 1966 when he was in the squad room preparing to go on duty, the desk reported that there had been a call for help as a woman was reported screaming in the alley in the 500 block of East 22d Street. Officer Renfro dispatched two cars and proceeded to the area himself. Renfro talked with the complainant and was advised that the screams had come from the alley across the street. He proceeded to the area where he contacted Sergeant Lamb, and as he was talking to him, Miss Borden walked out of the alley and approached them. Her first statement was "I was just raped". Officer Renfro noted that there was blood on Miss Borden's face and nose and mouth. She gave him a partial description of the individual and that information was relayed to other units in town to be on the lookout. Officer Renfro took Miss Borden to the hospital. Following the examination, he took her to police headquarters where she identified the accused in his presence. Renfro noted that Gosa's jacket was missing some buttons and that there was blood on one of his sleeves and soil on the knees of his trousers. At the hospital he had observed leaves and grass being removed from Miss Borden's hair (R. 41-44).

Prior to joining the Cheyenne Police Department, Sergeant Albert Lamb had ben employed by Scotland Yard. On 13 August 1966, he was on duty on the 4 p.m. to midnight shift and as he was going off duty a call was received reporting that a female was screaming in an alley between Van Lennen and Evans at 22d and 23d Streets. He proceeded to the area with Lieutenant Nelson who was chief of the Patrol Division. They arrived at the scene shortly after midnight. About fifteen minutes after

midnight Sergeant Lamb saw a female running down an alley toward him and Officer Renfro. This female identified herself as Shirley Borden. She had a lot of blood on her face, was in an hysterical condition, and at the time stated "I've been raped". She described the subject as a male Negro with short curly hair, wearing a corduroy jacket and dark pants. About a half an hour later Sergeant Lamb was advised that a police dog had picked up the scent of the subject and was going north on Van Lennen towards Pershing. At that time Sergeant Lamb and Lieutenant Nelson headed the dog in an attempt to intercept the subject. As they pulled up to the gate of Francis E. Warren Air Force Base, they noticed the accused, who fit the description given by Miss Borden, approaching the gate. He was asked to come over to the police car and Sergeant Lamb noticed the knees of his pants were soiled with mud and dirt. Gosa was taken to the police station where he was identified by Miss Borden. Sergeant Lamb noted what appeared to be mud on Gosa's shorts, a slight trace of what appeared to be dry blood on the fly of the shorts, and on the inside of the fly of the pants he was wearing (R. 49-52).

Robert A. Bigley is an OSI special agent assigned to Detachment 1402. On 10 October 1966 he questioned the accused relative to an allegation that he had raped a girl residing in Cheyenne on or about the night of 13-14 August 1966. Prior to questioning Gosa on the matter, Special Agent Bigley advised him of his rights under Article 31. He further advised him that he did not have to make any statement concerning the matter, that he had a right to a lawyer, and that if he did not have a lawyer, the Air Force would appoint one for him. Gosa was further advised that he had a right to have a lawyer present during the interrogation, that he was free to take a break during interrogation, and to smoke if he liked. Gosa advised Agent Bigley that he understood his rights under Article 31 and that he did not desire to have a lawyer present during the interrogation (R. 57-58). At no time during the interrogation did Special Agent Bigley indicate to the accused that things

would go easy on him if he confessed to raping Miss Borden. Neither did Bigley ever tell the accused that if he went on trial he wouldn't have a chance, that he would be found guilty. Agent Bigley further did not indicate to Gosa that if he would give an oral or written statement, Bigley would do what he could to see that the accused was sent to Fitzsimons Army Hospital in lieu of a court-martial. No pressure was applied in getting Gosa to make an oral admission (R. 116). Gosa advised Mr. Bigley that in the late afternoon or early evening of 13 August he had played touch football with several other airmen in the squadron. This game terminated about dusk and Gosa went to his barracks and lay down because he was suffering from a headache. He either blacked out or passed out. Later in the evening Gosa was awakened by another airman. He got up, showered, and departed for downtown Cheyenne. After he got downtown he went to the Twin Sisters Cafe and saw several other airmen. He drank some wine with them. He left the cafe and started walking but was not really sure where he was. When he noticed a girl approximately half a block away from him on the opposite side of the street, he thought the girl looked like a girl named Charlotte whom he had previously met. He called out to her but she gave no indication that she heard him. However, she did cross the street and continue walking on the sidewalk on the same side of the street that he was on. Gosa stated that he walked up behind the girl, grabbed her by one arm around the waist, spun her around, and dragged her to a nearby alley. When he got to the alley he removed his jacket, put it down on the ground and raped the girl on the spot. Upon completion, he arose, pulled up his trousers, and departed. On reaching the street, he turned right and started walking towards Francis E. Warren Air Force Base. After he had walked approximately a block, he turned around and saw the girl standing in the alley entrance and heard her screaming (R. 123-125).

Special Agent Charles A. Schulter of the Office of Special Investigations, was present when Special Agent Bigley, was interviewing the accused on 10 October 1966.

At no time were any inducements offered to Gosa, nor was he told that things would go easy for him if he made a statement. Nothing was said about trying to see that Gosa was sent to Fitzsimons Army Hospital in lieu of a court-martial. Gosa was very vague on some of the details of the incident but he did admit that he had raped the girl. The following day Gosa was then advised of his rights and declined to execute a signed sworn, statement because he felt it would speed up court-martial proceedings and he would be sent to prison sooner (R. 128-130).

Mrs. Isabel L. Bentley is a school teacher who resides at 20 East 22nd Street, Cheyenne. On 13 August 1966 she had retired shortly after 11:00 p.m. and had just dozed off when she was awakened by a terrible scream. The screams were also heard by Mr. Bentley and he jumped up and opened up the back door of the house. Mrs. Smith, the next door neighbor, opened her door at the same time and as a result of the discussion between the Bentleys and Mrs. Smith the police were called. Very shortly after that, Mrs. Bentley saw a figure come across Mrs. Lawlor's front yard. Mrs. Bentley could see pants legs so she assumed that it was a man who appeared to be carrying something. The figure went up on Mrs. Lawlor's porch and then came down and went between Mrs. Lawlor's and Mrs. Rayor's house. When the police arrived they were directed to the alley between Lawlors and Rayors. The figure that Mrs. Bentley saw walking appeared to be carrying something that looked to Mrs. Bentley like a person.

b. For the Defense.

On cross-examination of Miss Borden, the defense ascertained that that evening she was dressed in shorts with a short top that just came down around the waist. As she was walking down the street, the accused started walking behind her on the sidewalk. She did not speak to him and Gosa did not say anything to her. Miss Borden was running and after she had ben grabbed by the accused, she screamed. She was quiet all the time except when she screamed, and was really in fear of her life.

The total length of time from when Miss Borden was grabbed by Gosa until he went away was about ten minutes. Both Miss Borden's shorts and pants were off. They had ben removed by the accused. The zipper on the shorts was broken and they were held up by safety pins which had to be removed to take off her shorts. Miss Borden told Gosa about the safety pins. Other than scratches on her knees and a bloody nose, there were no other scratches or marks on Miss Borden. She has frequent nosebleeds. If the accused had had on other clothing, Miss Borden would not have been able to identify him. Other than Ed Loetcher and her parents, Miss Borden had not told anyone about the incident. Miss Borden did not appear at court downtown because she did not want the publicity and she didn't want to get Loetcher involved in it. Further, she was supposed to be out of town because the police had told her to leave. She had been convicted of shoplifting in May of 1966. Other than telling Gosa where the safety pins were located and advising him of the presence of Tampax, she had no other words with the accused because it wouldn't have done any good if she had said anything. Miss Borden did not assist in removing her clothing at all. Subsequently, Miss Borden was not sure who had removed the Tampax (R. 28-30).

The defense elicited from Officer Renfro that the telephone call relative to this incident was made from a site about six blocks from the police station. There were several calls made and one was from across the street. Miss Borden's clothing did not indicate that she had been involved in some degree of violence. They did not look mussed.

On cross-examination Special Agent Bigley indicated that the last time he had seen the accused on 11 October, the accused advised him that he did not desire to make a written statement because he was afraid that if he did make a statement, it would speed up his court-martial and he would be sent to jail. Gosa further indicated that he would do anything to stay out of jail and send money home to his parents and younger brother who needed monetary assistance. Although the father was not

hospitalized at that time, he had suffered from several heart attacks (R. 118-119). At the time Agent Bigley was questioning the accused he had Miss Borden's statement which he used to assist in his interrogation. Gosa did not sit down and dictate a long detailed story without being questioned as to details by Agent Bigley (R. 125-127).

During Agent Schulter's and Bigley's interrogation the accused appeared to be nervous and somewhat emotional but he did not break down at any time. The accused was not arrogant at all. During the interrogation the accused told at least three stories but was unable to give the investigators any substantial information as to whom they could interrogate to substantiate these stories. The story Agent Schulter reiterated to the court was said by Gosa to be true and he denied the truth of any of the other stories (R. 130-138).

On cross-examination Mrs. Bentley indicated that she was not sure of the sex of the person she saw walking but she saw pants legs and a "kind of a shape of a man's head". Nor was she sure that the object being carried by this walking figure was a person or not (R. 140).

The accused testified under oath that in the late evening on 13 August 1966, he was downtown in Cheyenne and saw a girl walking down the street. He thought he recognized her as a girl he knew as Charlotte. He called to her but there was no indication that she had heard him so the accused proceeded down the sidewalk and caught up with her. They continued walking and talking in general terms and the accused commented that he knew of Charlotte's involvement in an incident with another airman. On receiving no indication that the girl knew what he was talking about, he told her of the incident and asked her what she would do. Receiving no comment, Gosa took the girl's hand and walked into an alley and had sexual intercourse with her. As Gosa was leaving the alley, and after he had gone half-way up the block, the girl came to the end of the alley and screamed and went back into he alley. Gosa then continued to walk back to the base and was picked up by civil au-

thorities. There is no question that he had sexual intercourse with the girl who did not protest his advances. Miss Borden was the girl that the accused had seen at the earlier incident downtown. Gosa did not drag her back and did not undress her. The girl undressed herself. She did tell him about the pins but that was because she had dropped one. At no time did the girl set up any kind of protest while they were going to the place where the sexual intercourse occurred. Prior to entering the alley they had walked approximately three blocks and were talking all the time. The accused averred that the girl did not scream until after the act of sexual intercourse had taken place and he had departed. The accused did not observe any police cars or policemen until he reached the gate at the base and it took him approximately 20 to 25 minutes to get there (R. 142-144).

2. OPINION.

a. The court was legally constituted throughout the trial and had jurisdiction over the offense and the person tried.

b. The accused had the requisite mental capacity at the time of trial and the requisite mental responsibility at the time of the commission of the offense (MCM, 1951, ¶ 138a).

c. The law officer correctly and adequately instructed the court in substantial compliance with Article 51c, Uniform Code of Military Justice (R. 193-200). Included in those instructions is the following: "There is evidence of some prior out of court statements by the accused which are inconsistent with his testimony by the court. These prior statements made by the accused are admissible in evidence only for the limited purpose of impeaching his credibility. The court is therefore instructed that these prior statements may be considered by the court only in determining the credibility of the accused as a witness. The court may not consider these prior statements, or any part of them, for the purpose of establishing the truth of the inconsistent matters as-

serted therein." This broad statement could be interpreted to include the accused's out of court statement given to the OSI agents which amounted to a confession. The instruction was certainly not prejudicial to the accused.

d. By his plea of not guilty to the charge and specification, the accused placed upon the Government the burden of proving beyond a reasonable doubt each element of the offense alleged. The elements of the alleged offense are:

(1) that, at Cheyenne, Wyoming, on or about 13 August 1966, the accused committed an act of sexual intercourse with Shirley Ann Borden;

(2) that Shirley Ann Borden was not the accused's wife; and

(3) that the act was done by force and without her consent.

The testimony of the victim in this case, which in my opinion was not self-contradictory, uncertain, or improbable, reflects that on the evening of 13 August 1966, as she was walking down the street she was overtaken by an individual and subsequently dragged or carried down an alley, choked and threatened after she had screamed. The incident ended in an act of sexual intercourse against which she did not struggle because she was in fear of her life. The accused has admitted that he was the individual that had sexual intercourse at that time and place with the victim; however, his contention that the act was voluntary on the part of the victim and that she did not scream until after the act had taken place, is not substantiated by other evidence of record. People living in the neighborhood heard the screaming and subsequently saw a person wearing pants apparently carrying another person down the alley. The police were called and arrived on the scene in approximately ten minutes, the length of time both the accused and the victim indicated that they were together.

At no time during the trial was any direct evidence presented that Miss Borden and Airman Gosa were not married to each other. However, it did appear Miss

Borden had never seen the accused prior to the night of 13 August 1966 (R. 33). Further, both counsel constantly referred to her as Miss Borden and the fact that the accused and the victim had different surnames necessarily implies that the victim was not the wife of the accused (United States v. Voudren, 33 CMR 722, pet. den., 33 CMR 436; United States v. Childers, 31 CMR 747, pet. den., 32 CMR 472).

The foregoing together with the justifiable inferences that can be drawn therefrom appears to my mind convincing beyond a reasonable doubt as to the accused's guilt of the offense alleged. You, too, must be convinced beyond a reasonable doubt of the accused's guilt before approving the findings of guilty.

e. The sentence is within the power of the court to adjudge, is within the prescribed limitations on punishment and is in proper form (R. 211; App. Ex. 3).

f. There are no errors or irregularities reflected in the record of trial materially prejudicial to any substantial rights of the accused within the meaning of Article 59, Uniform Code of Military Justice. However, the following matters merit comment:

(1) During the pre-arraignment proceedings, assistant trial counsel inquired as to the qualifications of individual counsel pursuant to Article 27b. Defense counsel's reply was "Individual counsel, by virtue of his admission to the Bar of Maryland, is qualified." Article 27b, UCMJ, of course, discusses certification of judge advocates rather than qualification, and counsel merely by being a member of the bar of the highest court of any state is not certified in accordance with Article 27b. Such certification is granted only by The Judge Advocate General.

(2) The president of the court was furnished Appellate Exhibit 1 to use in swearing in the counsel. It is noted that in the oath given individual counsel, Lieutenant Tulley, that he was referred to as the assistant defense counsel. The orders appointing the court, of course, reflect that there was no assistant defense counsel and the record further reflects that Lieutenant Tulley was the individual defense counsel. However, the refer-

ence to assistant defense counsel is of no great moment as the oath taken by all counsel is the same with the exception of the duties to be performed. Duties of defense counsel, assistant defense counsel, and individual counsel are much the same. I would like to commend the practice of having the law officer administer the oaths to counsel in a general court-martial.

(3) Both in an out of court hearing and in open court Gosa averred that he told Sergeant Dougherty, the NCOIC of the Confinement Section, that if the OSI kept questioning him the way they were that he was going to admit that he was guilty as he was tired of the questioning. Gosa admitted that he had been advised he could take a break at any time and he did not request one. Gosa further claimed that he was advised by the investigators that if he would cooperate with them, they would help him and would see that instead of being tried, he would be sent to the Fitzsimons General Hospital for treatment. The allegations of Gosa relative to these matters were denied by both OSI agents, both testifying that at no time did they give any indication that things would go easy on the accused if he confessed, nor did they tell him he wouldn't have a chance if the case went to trial. Further, no statements to the effect that they would help him be sent to Fitzsimons General Hospital in lieu of court-martial were made. The accused's interrogation began at approximately 0830 in the morning and lasted until 111 when the parties went to lunch. The interrogation resumed about 1315 and was concluded at approximately 1800 hours. The issues raised by the accused were considered by the law officer who overruled defense's objection to the introduction of the accused's out of court oral statement to the OSI agents and the question was presented to the court with appropriate instructions.

(4) The law officer approached dangerous grounds when questioning the accused on the voluntariness of his statement when he asked the following question: "Airman Gosa, did I understand you correctly—you said a minute ago and I understood, you admitted you made these admissions only because of the questioning that

you were being subjected to and not because these statements of admission were true?" (R. 111). Had the last clause not been included, comment relative to the question would not be necessary. However, taking the question as a whole it cannot be interpreted as seeking an answer from the accused as to whether the statement he gave the OSI agents was true or false.

(5) Many pen and ink corrections have been made in the record of trial by those responsible for preparing and authenticating it and many more could have been made. Two rather noticeable uncorrected errors are as follows:

> "LO: We will call this out of court session into hearing and session" (R. 177) and "(Court recessed at 1545 hours, 1 December 1966 and reconvened at 1415 hours, 1 December 1966)" (R. 135). Checking the record it is obvious that the court reconvened at 1615 hours.

3. POST TRIAL ALLEGATIONS.

Subsequent to the trial, the accused submitted for consideration by reviewing and appellate authorities, several matters which his counsel referred to as "complaints and requests". These matters are as follows:

a. The accused alleged that the staff judge advocate to the officer exercising special court-martial jurisdiction (Major Samuel R. Richman) talked with two members of the court during recesses at trial. The first occasion was when the president of the court entered Major Richman's office and remained approximately five minutes. Affidavits obtained from Colonel Child and Major Richman indicate that during the first day of trial when it appeared that counsel for both sides were not ready to reconvene following a recess, Colonel Child stopped by the doorway to Major Richman's office and inquired as to the reason for the delay and the probable extent of it. He was advised that counsel were interviewing a witness and the court would resume as soon as possible. The accused further averred that immediately after the first day of trial the president, Colonel Child and a court member, Captain Charles M. Copple, gathered in Major

Richman's office for at least twenty minutes with Major Richman. Major Richman's affidavit indicates that at the conclusion of the first day of trial, he departed the building with Lieutenant Colonel Williams, the Law Officer, and proceeded directly to the Officers' Club for dinner. Colonel Child in his affidavit indicates that at the conclusion of the first day of trial, he proceeded to the main portion of the legal office, retrieved his hat and coat and departed. An affidavit obtained from Captain Copple reflects that after he left the court room, he went directly to the coat rack, got his hat and coat and went directly out of the building to his home. Lieutenant Colonel Williams states in his affidavit that at the conclusion of the first day of trial, he was introduced to Major Richman's wife and they proceeded directly to the club at the court's adjournment. Affidavits from 1st Lieutenant William D. Watson, the trial counsel, and 1st Lieutenant Lyman L. Frick, the assistant trial counsel, substantiate the information furnished by Colonel Child and Major Richman. That portion of the accused's complaint has no merit.

b. The accused further alleged that approximately one week before trial, he overhead Major Richman direct Sergeant Cole, the NCOIC, to call Mrs. Bentley at a certain number, and if she couldn't be reached, to then try another number at a school. Gosa saw Sergeant Cole dial a number and reach Mrs. Bentley at which time he (Gosa) was escorted from the office by an air policeman. On the afternoon of the first day of trial, Gosa observed Mrs. Bentley talking with Major Richman in his office. They were later joined by trial counsel and assistant trial counsel. Subsequently Gosa's counsel were advised that Mrs. Bentley had been called as a witness for the Government. From the above the accused concluded that Major Richman "acted as prosecutor in seeking and talking with a surprise witness". Mrs. Bentley had not appeared as a witness at the Article 32 investigation. Gosa further alleged that Major Richman had acted beyon the scope of his position and violated Article 6c of the UCMJ. Major Richman's affidavit reflects that Mrs. Bentley had previously indicated a preference not to ap-

pear and testify at the trial and his efforts to contact her prior to trial were with a view to offering her voluntary appearance rather than necessitating being subpoenaed. Affidavits from the trial counsel and assistant trial counsel reflect that when Mrs. Bentley was being interviewed relative to her testimony, they were the only ones present—and Major Richman had merely introduced Mrs. Bentley to them. Article 6c of the UCMJ prohibits anyone who has acted as a member, law officer, trial counsel, assisting trial counsel, defense counsel, assistant defense counsel, and investigating officer in any case to subsequently act as a staff judge advocate or legal officer to any reviewing authority on the same case. The reviewing authority in this case is, of course, the officer exercising general court martial jurisdiction and Major Richman in no wise has acted as a staff judge advocate or legal officer to that officer.

c. The accused further claims that for the above stated reasons Major Richman's clemency report should not be considered by higher authorities because of "obvious bias which was demonstrated by him during trial". There is nothing in the record and the accused has not presented any information, which warrants a conclusion, or even a suspicion, that Major Richman acted in any manner not consistent with the duties and responsibilities imposed upon a staff judge advocate to a special court-martial convening authority. His position in the case is set forth in his clemency report and in considering his evaluations and recommendations, you should at all times bear in mind his previous participation in this case.

d. I fail to find any prejudice to the accused in any of the matters submitted.

4. CLEMENCY CONSIDERATIONS.

a. The prosecution presented no evidence of previous convictions.

b. Summary of mitigation and extenuation evidence given at trial.

In his capacity as administrative supervisor at the base confinement facility, Sergeant Doughterty has had

an opportunity to observe the accused's conduct for some two and a half months. Airman Gosa was very courteous toward supervisory personnel and has not given confinement personnel any trouble at all. His attitude was considered to be above average for a prisoner.

Defense counsel made an unsworn statement on behalf of the accused in which he indicated that Gosa was quite new in the Air Force and had only been at Francis E. Warren Air Force Base since July 1966. Counsel further stated that Gosa's father was a farmer and that the accused has two sisters and three brothers in the family. The accused completed high school and while in high school participated in track and football. The Gosa family is a church-going family all belonging to the Baptist Church. The accused's mother suffers from ulcers and his father who has had several heart attacks has not been able to work on the farm lately. The accused was employed on the farm with his father during school and he also worked at a race track as a "valet". The accused has not advised his parents of his difficulty because of their health. Gosa hopes to qualify for the GI bill and go on to school studying math with the idea of teaching.

c. The clemency report attached hereto for your consideration was prepared by Lieutenant Colonel (then Major) S. R. Richman, Staff Judge Advocate of Francis E. Warren Air Force Base, Wyoming. Lieutenant Colonel Richman has previously acted in the capacity of staff judge advocate to the officer exercising special court-martial jurisdiction. The clemency report includes Lieutenant Colonel Richman's report of his personal interview with the accused, his evaluations and recommendations as well as those of the accused's commander, the base chaplain, the accused's first sergeant, his immediate supervisor, and the confinement officer. A copy of the clemency report was served on the accused and he was advised that he could submit matters in denial, rebuttal, or explanation of any of its contents. The accused acknowledged receipt of the report and took exception to numerous conclusions expressed therein. A copy of the

clemency report, and accused's acknowledgment of receipt of a copy thereof, and the reply of the accused to the report, are attached hereto, made a part hereof and incorporated herein.

d. At the time of the commission of the offense, the accused was eighteen years old and had less than three months active duty. His military career was of such short duration that it can add nothing to a determination as to the sentence which should be approved. Among those submitting clemency reports, only the chaplain has recommended that the sentence not be approved as adjudged. He recommends that the period of confinement be reduced and that Gosa be given "intensive psychiatric counseling". The offense of which the accused stands convicted has been termed "a most detestable crime". It does not appear that the accused as yet understands the seriousness of his actions. This perhaps is understandable based on his previous uninhibited sexual freedom. (The accused admits to siring three illegitimate children by three different females prior to his entry into the service. In view of the maximum punishment that could have been imposed upon the accused, I feel that the court was extremely lenient in adjudging the sentence in this case. Accordingly I recommend that the sentence as adjudged by the court be approved. The United States Disciplinary Barracks, Fort Leavenworth, Kansas, should be designated as the place of confinement pending completion of appellate review.

/s/ Oscar H. Emery, Jr.
OSCAR H. EMERY, JR., Lt. Colonel, USAF
Assistant Staff Judge Advocate
Staff Judge Advocate

RECOMMENDATIONS OF THE STAFF JUDGE ADVOCATE

1. I have read the record of trial and I concur in the foregoing review.
2. The foregoing review constitutes the reviewer's and my summary of the evidence, opinion as to the adequacy

and weight of the evidence, effect of any error or irregularity respecting the proceedings, and recommendations as to the action to be taken with respect to the findings and sentence. As the convening authority in this case, you are empowered to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Before approving a finding of guilty, you must determine that such finding is established to your satisfaction beyond a reasonable doubt by competent evidence of record. I, like the reviewer, am convinced that the accused's guilt as to the offense of which he stands convicted, has been so established. In acting on the findings and sentence, you are empowered to approve only such findings of guilty and the sentence or such part or amount of the sentence as you find correct in law and fact, and as you in your discretion determine should be approved. Your exercise of discretion in determining what sentence to approve includes the power of commutation (the changing of a punishment to a less severe one of a different nature), as well as the powers of mitigation, suspension, and remission.

3. I recommend that the sentence be approved. The appropriate place of confinement, pending completion of appellate review, is the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

4. A form of action which will accomplish the above recommendations is attached for your signature.

/s/ Harold R. Vague, Colonel, USAF
Staff Judge Advocate

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS FIFTEENTH AIR FORCE
March Air Force Base, California 92508

GENERAL COURT-MARTIAL ORDER
NUMBER 14

11 March 1967

Before a general court-martial which convened at Francis E. Warren Air Force Base, Wyoming, pursuant to Special Order C-49, Headquarters Fifteenth Air Force, 2 November 1966, was arraigned and tried:

AIRMAN THIRD CLASS JAMES R. GOSA, AF1495-9979, United States Air Force, 809th Combat Defense Squadron.

Charge: Violation of the Uniform Code of Military Justice, Article 120

Specification In that AIRMAN THIRD CLASS JAMES R. GOSA, United States Air Force, 809th Combat Defense Squadron, Francis E. Warren Air Force Base, Wyoming, did, at Cheyenne, Wyoming, on or about 13 August 1966, rape Shirley Ann Borden.

PLEAS: To the specification and charge, not guilty.

FINDINGS: Of the specification and charge, guilty.

SENTENCE: To be discharged from the service with a Bad Conduct Discharge, forfeit all pay and allowances, to be confined at hard labor for 10 years and to be reduced to the grade of Airman Basic. (No previous convictions considered).

DATE ADJUDGED: The sentence was adjudged on 2 December 1966.

ACTION BY THE CONVENING AUTHORITY:

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS FIFTEENTH AIR FORCE, March Air Force Base, California, 11 MAR 1967

In the foregoing case of AIRMAN THIRD CLASS JAMES R. GOSA, AF14959979, United States Air Force, 809th Combat Defense Squadron, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after the date of this action. The record of trial is forwarded to The Judge Advocate General of the United States Air Force for review by a board of review. Pending completion of appellate review the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D. C.

In the Board of Review, United States Air Force

Before CORRIGAN, Chairman, BOUCHER and TORVESTAD, Members Judge Advocates

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AFJAMA-2 ACM 19784 26 May 1967

UNITED STATES

v

Airman Third Class JAMES R. GOSA, AF14959979, 809th Combat Defense Squadron

FIFTEENTH AIR FORCE (SAC)

Sentence adjudged 2 December 1966 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Approved sentence: Bad conduct discharge, total forfeitures, confinement at hard labor for ten (10) years, and reduction to airman basic.

Appearances:

Colonel Joseph Buchta and Lieutenant Colonel Milton E. Kosa, appellate counsel for the accused; Colonel James R. Thorn, appellate counsel for the United States.

DECISION

In the above-entitled case, the Board of Review, having found the approved findings of guilty and sentence correct in law and fact, and having determined on the basis of the entire record that they should be approved, hereby affirms the same.

[Absent]
JOSEPH F. CORRIGAN

/s/ Ernest Boucher
ERNEST BOUCHER

/s/ Robert J. Torvestad
ROBERT J. TORVESTAD

UNITED STATES COURT OF MILITARY APPEALS

No. 20,304

UNITED STATES, APPELLEE

v.

Airman Third Class JAMES R. GOSA (AF 14959979), APPELLANT

ORDER DENYING PETITION FOR REVIEW

On consideration of the Petition for Grant of Review of the decision of the Board of Review in case No. ACM 19784 of the United States Air Force, it is, by the Court, this 16th day of August, 1967,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

/s/ Frederick R. Hanlon
FREDERICK R. HANLON
Acting Clerk

JAMES R. GOSA, former Airman Third Class, U. S. Air Force, PETITIONER

v

UNITED STATES, RESPONDENT
19 USCMA 327, 41 CMR 327

Courts-martial § 43—application of Supreme Court decision setting forth limitations on court-martial jurisdiction.

The limitations on court-martial jurisdiction set forth in O'Callahan v Parker, 395 US 258, 23 L Ed 2d 291, 89 S Ct 1683, do not apply to cases that had become final before the date of that decision.

Miscellaneous Docket No. 69-64
March 20, 1970

On petition for Reconsideration.[1] Petition denied.

Colonel Bertram Jacobson and *Major Frank T. Moniz* were on the pleadings for Petitioner.

Colonel James M. Bumgarner and *Major Robert L. Bates* were on the pleadings for Respondent.

OPINION OF THE COURT

DARDEN, Judge:

In December 1966 a general court-martial[2] at Francis E. Warren Air Force Base, Wyoming, convicted the petitioner of raping a civilian off military property in Cheyenne, Wyoming, and sentenced him to a bad-conduct discharge, total forfeitures, confinement at hard labor for ten years, and reduction to the lowest pay grade. This

[1] The application is actually titled "Motion to Vacated [sic], Sentence and Conviction, with all deprived right and privileges restored." In substance, however, it amounts to a petition for reconsideration.

[2] ACM 19784.

Court denied his petition for grant of review in August 1967. He now is serving his sentence at the Federal Correctional Institution, Tallahassee, Florida.

The petitioner filed with this Court a motion to vacate sentence as a result of a decision by the Supreme Court of the United States in O'Callahan v Parker, 395 US 258, 23 L Ed 2d 291, 89 S Ct 1683 (1969), and the decision of this Court in United States v Borys, 18 USCMA 547, 40 CMR 259 (1969), applying the *O'Callahan* principle to a case that was still subject to direct review before the date of the *O'Callahan* opinion. He also petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Florida. That petition was denied in Gosa v Mayden, 305 F Supp 1186 (1969), an opinion referred to in the decision of this Court in Mercer v Dillon, 19 USCMA 264, 41 CMR 264 (1970), in which we held that the *O'Callahan* principle does not apply to cases that had become final under Article 76 of the Uniform Code of Military Justice, 10 USC § 876, before the date of the *O'Callahan* opinion.

For the reasons outlined in *Mercer* the petition is denied.

Chief Judge QUINN concurs.

FERGUSON, Judge (dissenting):

I dissent.

In this petition, as in Mercer v Dillon, 19 USCMA 264, 41 CMR 264 (1970), the question now before us revolves about the prospective or retrospective application of the Supreme Court's decision in O'Callahan v Parker, 395 US 258, 23 L Ed 2d 291, 89 S Ct 1683 (1969), that a court-martial is without jurisdiction to proceed unless the charged offense is "service-connected." The majority of this Court have denied the accused's petition for extraordinary relief, in accordance with their

holding in *Mercer* that the principle of the *O'Callahan* opinion applies only to those cases still subject to review by this Court on the date of the *O'Callahan* opinion.

I have no alternative but to record my disagreement with their holding in this case for the same reasons as set forth in my dissent in Mercer v Dillon, supra.

Since I believe that the court-martial lacked jurisdiction over the charged offenses (O'Callahan v Parker, supra; United States v Borys, 18 USCMA 547, 40 CMR 259 (1969)), I would grant the petition, set aside the findings and sentence, and order the charges dismissed.

JAMES ROY GOSA, PETITIONER

v.

J. A. MAYDEN, Federal Correctional Institution, Tallahassee, Florida, RESPONDENT

TCA 1519

UNITED STATES DISTRICT COURT
N. D. FLORIDA
TALLAHASSEE DIVISION

Nov. 13, 1969

Proceedings on petition for writ of habeas corpus by serviceman who was confined as result of court-martial. The District Court, Arnow, Chief Judge, held that Supreme Court decision that military men who commit non-service-connected crimes are entitled to indictment by grand jury and trial by a petit jury in a civilian court does not apply retroactively.

Writ denied.

Armed Services
Courts←100(1)

Supreme Court decision that military men who commit nonservice-connected crimes are entitled to indictment by grand jury and trial by a petit jury in a civilian court does not apply retroactively.

James Roy Gosa, in pro. per.

Clinton Ashmore, Asst. U. S. Atty., Northern District of Florida, Tallahassee, Fla., for respondent.

ORDER

ARNOW, Chief judge.

This cause is before this Court on petition for writ of habeas corpus. Petitioner is presently confined at the

Federal Correctional Institution, Tallahassee, Florida, as the result of a military court-martial on December 2, 1966. Petitioner alleges that he was convicted by military court-martial for a nonservice connected offense, and argues that the recent Supreme Court case of O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), should be applied retroactively to his case. The United States Attorney has responded to the Court's order to show cause by first denying that the rule of *O'Callahan* is applicable to the facts of this case, and then by arguing that even if applicable, *O'Callahan* should be applied prospectively, rather than retroactively.

From a reading of the record presented in this case, it is obvious that Petitioner was convicted by military court-martial for a crime which was non-service connected as defined by *O'Callahan*. Petitioner was convicted of rape, which occurred while he was off base, off duty, dressed in civilian attire, and with the woman involved being a civilian. The sole but important question remaining for this Court to consider is that of the retroactive application of *O'Callahan*.

The majority of the court in the *O'Callahan* case held that a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance or connection is entitled to his constitutional rights of indictment by a grand jury and trial by a petit jury in a civilian court, and that a court-martial proceeding has no jurisdiction over such crimes. In spite of the fact that the Supreme Court, in *O'Callahan*, talks in terms of a lack of jurisdiction on the part of military courts martial, this Court is of the opinion that the basic rules laid down in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), should apply to this case.

As previously pointed out, inherent in the *O'Callahan* decision is the constitutional right to trial by jury. In

an analogous situation, the Supreme Court, in DeStefano v. Woods, supra, held that the jury trial requirements imposed upon the states by Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522 (1968), should be applied prospectively rather than retroactively. In considering whether *O'Callahan* should be applied retroactively the following considerations laid out in Stovall v. Denno, 388 U.S. 297, 87 S.Ct. 1967 (1967), should be examined:

a) The purpose to be served by the new standard;
b) The extent of the reliance by law enforcement authorities on the old standards; and
c) The effect on the administration of justice of a retroactive application of the new standard.

The Court, in the *O'Callahan* case, went to great lengths to contrast the court-martial procedure with that of trial by a jury of one's peers. *O'Callahan* holds that military men who commit non-service connected crimes are entitled to indictment by a grand jury and trial by a jury, because our civilian court system is better able to protect the constitutional rights of defendants. This Court does not understand, or construe, *O'Callahan* as inferring or holding that all past military courts-martial must be labeled unfair and viewed as being infected with the danger of having convicted the innocent. The values implemented by the right to indictment by a grand jury and the right to a jury trial would not measurably be served by requiring retrial of all persons convicted in the past by a court-martial proceeding. Moreover, both the military and civilian authorities have relied on the previously unquestioned constitutionality of those provisions of the Uniform Code of Military Justice, enacted by Congress, that provided for military jurisdiction over non-service connected crimes committed by servicemen. As pointed out by Justice Harlan in a dissenting opinion in the *O'Callahan* case, the military was justified in believing they had jurisdiction over these non-service connected crimes. Finally, the effect of a holding of general

retroactivity on law enforcement and the administration of justice would be significant, because the military court-martial has been used extensively in this country for years. A figure supplied by the United States Attorney, in his response to this Court's order to show cause, estimates that there have been in excess of 4,000,000 court-martial convictions since 1917.

For these reasons, this Court holds that O'Callahan v. Parker does not apply retroactively.

Therefore, it is

Ordered: Petition for writ of habeas corpus is hereby denied.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29139

JAMES ROY GOSA,
Petitioner-Appellant,

versus

J. A. MAYDEN, WARDEN
Federal Correctional Institution
Tallahassee, Florida,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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(October 12, 1971)

Before GODBOLD, SIMPSON and CLARK, Circuit Judges.

CLARK, Circuit Judge: The sole, inexorable issue presented by this appeal requires us to predict whether the Supreme Court of the United States will apply its decision in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), to comparable proceedings of military courts which reached a stage of complete finality prior to June 2, 1969, the date that decision

was announced. The court below reasoned that *O'Callahan* should be denied retroactive application. We affirm.

It all started for James Roy Gosa on August 13, 1966. He was then serving as a member of the United States Air Force stationed at Warren Air Force Base in Wyoming, and on the night in question, he was officially off-duty and with permission of his superior officers had left the military post dressed in mufti. Around midnight Gosa allegedly raped a civilian in Cheyenne, Wyoming. The asserted victim was not on any type of military duty and had no direct or indirect relationship with the military establishment. Although Gosa was arrested by Cheyenne civilian authorities for prosecution in their courts, he was subsequently released from their detention when the complaining party failed to appear. He thereupon was immediately taken into military custody and was charged with violation of Article 120 of the Uniform Code of Military Justice (U.C.M.J.) 10 U.S.C.A §§ 920 , which provides that any person subject to the Code who commits an act of rape may be punished as a court-martial may direct. Pursuant to the provisions of subchapters IV and V, U.C.M.J. (10 U.S.C.A. §§ 816-829), a general court-martial was duly convened which tried petitioner and, on December 2, 1966, found him guilty as charged. All of the multiple review procedures provided by the U.C.M.J. were accorded.[1] On July 11, 1967 Gosa peti-

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[1]The convening authority referred the record to his Staff Judge Advocate for review as required by Article 61, U.C.M.J. (10 U.S.C.A. § 861). In what Gosa himself acknowledges was a comprehensive review of the record, the Staff Judge Advocate submitted his written opinion to the convening authority, that

tioned the Court of Military Appeals for a grant of review under Article 67, U.C.M.J. (10 U.S.C.A. § 867). All direct review procedures were exhausted and Gosa's conviction became final in law on August 16, 1967 when the Court of Military Appeals denied review.

On August 21, 1969, Gosa filed his application for a writ of habeas corpus in the court below and on the 6th of November, 1969, filed with the United States Court of Military Appeals a motion to vacate his sentence and conviction. Both the application and the motion were based upon assertions that Gosa's confinement was invalid in the light of the decision in *O'Callahan* that the general court-martial which tried him lacked jurisdiction. Both the application for habeas relief and the motion to vacate, which the Court of Military Appeals treated as a petition for reconsideration, were denied.[2]

O'CALLAHAN — COMPARISON AND ANALYSIS

The Supreme Court granted a petition for certiorari review of a Tenth Circuit case styled *Relford v. Com-*

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the findings and sentence of the general court-martial were correct in law and in fact. Subsequently the convening authority approved the findings and sentence as required by Article 64, U.C.M.J. (10 U.S.C.A. § 864), and pursuant to Article 65, U.C.M.J. (10 U.S.C.A. § 865) the convening authority followed this final action by sending the entire record, his action and the opinion of his Staff Judge Advocate to the Judge Advocate General of the United States Air Force where it was reviewed by a Board of Review pursuant to Article 66, U.C.M.J. (10 U.S.C.A. § 866). This Board affirmed both the finding of guilt and the sentence.

[2]305 F.Supp. 1186 (N.D.Fla. 1969); 19 U.S.C.M.A. 327, 41 C.M.R. 327 (March 20, 1970)

mandant U.S. Disciplinary Barracks, Ft. Leavenworth, for the limited purpose of deciding the retroactivity and scope of *O'Callahan. See* 397 U.S. 934, 90 S.Ct. 958, 25 L.Ed.2d 529 (1970). However, when *Relford* came on to be heard on its merits the Court determined that because Relford's offense had been perpetrated within the geographical boundary of a military post, it had a service connection which *O'Callahan* lacked. Thus, a decision on retroactivity was deemed inappropriate. ___ U.S. ___, 91 S.Ct. 649, ___ L.Ed.2d ___ (1971). *Relford* enumerated 12 factors which, if present, deprive a miltary court-martial of jurisdiction to try a member of the Armed Forces otherwise under the jurisdiction of that court by the congressional mandate of Article 2, U.C.M.J. (10 U.S.C.A. § 802)[3] Each of these factors is unquestionably present in Gosa's case; indeed the only distinction, locale — the Territory of Hawaii vis-a-vis the State of Wyoming — if effective at all, makes

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[3] 1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
One might add still another factor implicit in the others:
12. The offense's being among those traditionally prosecuted in civilian courts.
See also Articles 17 & 18, U.C.M.J. (10 U.S.C.A. §§ 817 & 818).

Gosa's case stronger. Indubitably, had *O'Callahan* been rendered prior to these events in Gosa's case, that decision would have deprived the general court-martial which tried Gosa of jurisdictional authority to hear or determine that cause.[4] We cannot avoid deciding the scope of its applicability as precedent. We therefore must analyze it.

In *Relford*, the Court capsuled its prior holding in *O'Callahan* thus:

> [B]y a five-to-three vote, the Court held that a court-martial may not try a member of our Armed Forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were committed off-post on American territory when the soldier was on leave and when the charges could have been prosecuted in a civilian court.

Looking in greater detail to the opinion itself, we first note that certiorari in *O'Callahan* was limited to the question:

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[4]Not only did Gosa's alleged crime occur prior to *O'Callahan*, his conviction and sentence became final to the date of that decision; thus, there is no occasion for us to take any position on the issue of partial retroactivity accorded to the decision by the United States Court of Military Appeals which has, since the date of that decision, applied *O'Callahan* to void every court-martial action affecting a serviceman similarly situated whose conviction was still on direct review on June 2, 1969. Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (March 6, 1970).

> Does a court-Martial, held under the Articles of War, Tit. 10, U.S.C. § 801 *et seq.*, have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court? 393 U.S. 822, 89 S.Ct. 177, 21 L.Ed.2d 93.

After reciting the unlimited grant of congressional authority "To make Rules for the Government and Regulation of land and naval Forces" contained in Article I, Section 8, Clause 14 of the Constitution, and the Bill of Rights language which excepted only cases arising *in the land or naval forces*, and excepted those cases only from the Fifth Amendment's requirement of grand jury presentment or indictment, Mr. Justice Douglas, speaking for the majority, pointed out that Congress had developed a system of military justice with fundamental differences from civilian courts. He stated the issue in these words:

> If the case does not arise 'in the land or naval forces,' then the accused gets *first*, the benefit of an indictment by a grand jury and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution which provides: in part:
>
> 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial

> shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.'
>
> *Those civil rights are the constitutional stakes in the present litigation.* (395 U.S. 262) (Final sentence emphasis supplied.)

Then, after a discussion of pre and post-Constitution military court history, the conclusion of the decision was put in this language:

> We have concluded that the crime, to be under military jurisdiction, must be service connected, lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers. (395 U.S. at 272)

Clearly then, grand and petit jury protections were the core rights sought to be vouchsafed. Since the opinion also spoke of other procedural aspects of the military system and compared some of these to civilian court processes, we cannot state with absolute assurance that the Court will later hold that only these two Bill of Rights protections were involved. However, this uncertainty is not critical to our conclusion.

Our analysis of *O'Callahan* must also center upon determining whether the Court decided that military tribunals lacked adjudicatory power over servicemen's offenses which were not "service-connected". Did the opinion hold that courts-martial lacked power over the subject matter and person of such a soldier because Congress had no constitutional authority to vest it, or did *O'Callahan* decide that the lack of grand and petit jury procedures (and perhaps other civilian court protections) resulted in the loss of jurisdiction otherwise within the control of congressional grant? In *Flemings v. Chafee*, ____ F.Supp. ____ (E.D.N.Y. 1971) [No. 70-C-1267, July 19, 1971], a most thorough and scholarly judicial determination, Judge Weinstein comes to the somewhat guarded conclusion that lack of adjudicatory power was the rationale of the decision. He also notes that other jurists have reached the opposite conclusion. *See* the decision here on appeal, *Gosa v. Mayden*, 305 F.Supp. 1186 (N.D. Fla. 1969); *Mercer v. Dillon*, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970); *Schlomon v. Moseley*, ____ F.Supp. ____ (1971) [Civ. No. L-1003, May 19, 1971]; and the opinion of the Board of Review [Art. 66, U.C.M.J.] in *United States v. King*, ACM 20361 (July 30, 1969), *review denied* ____ U.S.C.M.A. ____, 40 C.M.R. 327 ( ).[5]

Despite the weight of authority to the contrary, we find the reasoning of *Flemings* persuasive on this issue. Read with an open mind, *O'Callahan's* foundation, framework and structure deny to the legislation which

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[5]In what must be considered dicta since the serviceman did not come within *O'Callahan's* ambit, another district court also reasons against retroactivity without reaching this point. Thompson v. Parker, 308 F.Supp. 904 (M.D.Penn. 1970).

breathed the breath of judicial life into the forum that tried Sgt O'Callahan, the necessary basis in constitutional power to reach his type of case. It declares that because of the Bill of Rights, Article I, Section 8 cannot be read to enable Congress to authorize the military courts to try a peacetime soldier who, freed of military responsibility, albeit temporarily, is charged with a crime (a) cognizable in a civilian court and (b) having no military significance. It placed O'Callahan in the same status as a discharged serviceman,[6] a civilian employed by the Armed Forces overseas,[7] or a civilian accompanying the military service overseas.[8] Although the language of the opinion does not say it in so many words, it holds that a member of the Armed Forces has an area of off-duty life wherein his general serviceman status is an insufficient nexus to bring his actions under the constitutional range of military "Government and Regulation".

RETROACTIVITY — NEED IT BE TESTED

The threshold problem we face in the instant appeal presents a completely novel issue, for *O'Callahan* did not overturn a prior precedent of the Court. It invalidated a part of a law made by Congress. We must determine whether the Supreme Court's doctrines of retroactivity are applicable to a decision which undoes

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[6]United States, ex rel Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

[7]McElroy v. Guagliardo, 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960); Grisham v. Hagan, 361 U.S. 278, 80 S.Ct. 310, 4 L.Ed.2d 279 (1960).

[8]Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); Kinsella v. United States, ex rel Singleton, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960).

congressional action in a context where the Act involved has a half-century background of at least tacit judicial approval.

Of course it is illogical to assign shadings or degrees of nullity to acts which may be classed as void. But, with equal certitude, logic would assert that if a court decision reversing a prior judicial error of fundamental constitutional law must be tested for its retroactive impact, a court decision reversing a long established, judicially recognized legislative rule ought to be entitled to the same testing. For how could one assert that a proceeding which is invalid because it is in excess of constitutional right is less vacuous because its nullity results from judicial error rather than legislative action? Equally obviously, it is no more illogical to apply the rules for determining retroactivity to losses of liberty or property resulting from unconstitutional judicial precedent than to unconstitutional legislative action.

With these axioms in mind, we look to see how the doctrine of judicial determination of retroactivity came into existence. *Norton v. Shelby County, Tennessee,* 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886), declared that an unconstitutional *enactment* conferred no right, imposed no duty, afforded no protection and was, in legal contemplation, as inoperative as though it had never been passed.[9] In *Chicot County Drainage Dist.*

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[9]There is earlier, though non-judicial, precedent. In 1761, even before we had our present Constitution, the Colonial orator and patriot, James Otis, in his *Argument Against the Writs of Assistance,* stated: "An act against the Constitution is void; an act against natural equity is void." *See also* Nelson and Westbrook, *infra* n. 11.

v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), the Court retracted the broad statements of *Norton* and declared that those statements had to be taken with qualifications. It reasoned that the actual existence of a law prior to the determination of unconstitutionality is an operative fact and may have consequences which cannot justly be ignored. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the progenitor of the Court's precedents in this field, imported the rationale of *Chicot* into the criminal law. *Linkletter* is controlling precedent here for the assertion that there is no basis for distinction between legislation and judge-made law in reasoning retroactivity *vel non*.

Under our view set out above, *O'Callahan* presents another significant first in the field of retroactive adjudication because it involved a determination that the Constitution would not support a law which invested a judicial system with jurisdiction over the person and subject matter of the action tried. It has always been the law that proceedings of a court which is without jurisdiction of the subject matter are void, but does this inevitably lead to the necessity for full retrospective application of the court decision which first discovers and announces the jurisdictional deficit? We hold it does not.

Indeed, the question of jurisdiction lies at the second level in the analysis of the problem at hand. For though *O'Callahan* determines a lack of jurisdiction, the determination is the result of a new adjudication of constitutional right. Being taught as we will later show, that we can reject as inconsequential the specific pro-

vision of the Constitution on which a new precedent rests, as well as the relative value of the constitutional guarantee involved, we are impelled to the conclusion that this more than half-decade of precedent for selective retroactivity may not be ignored. In the light of this reasoning, no decision can arbitrarily be assigned full retroactivity solely on the basis that it operates on jurisdictional rather than proscribing the denial of a fundamental constitutional right that relates to another area of the processes of the criminal law.

Finally, one distinction remains to be made. The case at bar is not like *United States v. United States Coin & Currency*, —— U.S. ——, 91 S.Ct. 1041, —— L.Ed.2d —— (1971). There the Court prohibited a forfeiture of property which had its basis in the refusal of a citizen to incriminate himself, which is, of course, a form of conduct that could not have been constitutionally punished at any time from and after the date the Bill of Rights was adopted. Such right to refuse to incriminate oneself was not first confected in the decisions which declared that gambling registration forms would constitute self-incrimination and could not be required. Since there was no right to arrest the gambler who refused to file such forms, there was no right at all to seize his gambling equipment at the time of his illegal arrest. The opinion closes on this cogent note:

> In the case before us, however, even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized

is constitutionally immune from punishment. (—— U.S. ——, 91 S.Ct. at 1046)[10]

It begs the question to assert that because the issue in *O'Callahan* is pure jurisdiction that *Coin & Currency* is analogous. No citizen can rightfully be jailed for exercising his religious freedoms or petitioning his government for a redress of grievances, even though some new litigation situation could conceivably arise in which such deprivations of liberty would be expressly voided. His right to be free of such restraints is clearly established in the Constitution itself and not in decisional precedent. This is just not at all the same as the new view of the right of Congress to regulate military jurisdiction over Sgt. O'Callahan which the Court announced on June 2, 1969. This latter decision is in the same category as *Bloom v. State of Illinois*, 391 U.S. 194, 488 S.Ct. 1477, 20 L.Ed.2d 522 (1968), or any other new or altered adjudication that changes fundamental rights of those accused of crime. One of the *O'Callahan-Relford* criteria, see note 3 *supra*, is that the crime involved must be cognizable in a civilian court. The crime of rape, for which O'Callahan, Relford and Gosa were prosecuted, was equally contrary to the laws of the civilian jurisdictions involved and the U.C.M.J. The issue for those cases and Gosa's as well is not whether the accused could be tried at all, but which forum had the right to conduct the proceedings. Not whether, but where.

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[10] *See also* Harrington v. United States, —— F.2d —— (5th Cir. 1971) [No. 29481, July 14, 1971].

In sum, we hold that there is no arbitrary or simplistic basis for deciding retroactivity.[11] The heart of the doctrine is a reasoned application of new constitutional precedent. We must follow the course those decisions dictate in the case at bar.

RETROACTIVITY — GENERAL PRINCIPLES

The historical background against which the Supreme Court of the United States first explicated a set of rules to govern whether new court-enunciated constitutional principles of criminal law were to be invested with prospective, limited or fully retroactive application is detailed in Mr. Justice Clark's opinion in *Linkletter v. Walker, supra.* The intervening decisions which touched on this principle, as well as the comments of legal scholars who have explored the subject matter, have

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[11]We note that the opinions of commentators which have come to the attention of the *Flemings* court and to ours are in disagreement on this point. Nelson and Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian Offenses", an Analysis of O'Callahan v. Parker,* 54 Minn. L.Rev. 1, 45; *Note: Court-Martial Jurisdiction Limited to "Service-Connected" Cases.* 44 Tulane L.Rev. 417; and *Note: Constitutional Law - Retroactivity - Should O'Callahan be Applied Retroactively?,* 2 Tex.Tech.L.Rev. 106; all three reason that the structure of the opinion in terms of jurisdictional deficit does not preclude testing the rule's application by the retroactivity standards applied to other new applications of constitutional fundamentals and that the statements critical of the fairness of military justice do not overcome the persuasiveness of the reliance and effect criteria of the Supreme Court's retroactivity rulings discussed *infra.* Whereas, *Note: Denial of Military Jurisdiction over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts,* 64 Nw. U.L.Rev. 930, and *Note: O'Callahan v. Parker, A Military Jurisdictional Dilemma,* 22 Baylor L.Rev. 64, make the ipse dixit assertion that the jurisdictional tenor of the opinion obviously requires retroactivity.

just been collated in Mr. Justice White's opinion in *Williams v. United States*, ____ U.S. ____, 91 S.Ct. 1148, ____ L.Ed.2d ____ (1971).[12] We need not attempt to duplicate this effort. However, the problem in this case is not discovering precedent but determining how it should be applied.[13] We therefore deem more than bare citations necessary to develop the rationalization of our disposition of the vital and legally complex issue presented.

Linkletter denied full retroactive application to the rule of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). *Mapp* changed prior decisional law by holding that the Fourteenth Amendment operated to require State courts to exclude evidence from criminal trials when it had been obtained in searches and seizures

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[12]The only other Supreme Court cases which our research discloses have dealt with the issue, even tangentially, are Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968), which refused retroactive application to Lee v. Florida, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed. 1166 (1968), forbidding State use of evidence obtained in violation of the Federal Communications Act; North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which gave retroactive application to Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), declaring the Fifth Amendment's double jeopardy protections applicable to State criminal procedures. [*See* Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)]; DeBacker v. Brainard, 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed.2d 148 (1969), which applied the non-retroactive holding of DeSteffano v. Woods to a minor who had been denied the right of trial by jury; and the other cases decided the same day *Williams* was handed down which are discussed *infra*.

[13]*See* Mr. Justice Harlan's dissenting opinion in *Williams*, *supra*, ____ U.S. at ____, 91 S.Ct. at 1171, ____ L.Ed.2d at ____ (1971) in which he observed: "... *Linkletter* became almost as difficult to follow as the tracks of a beast of prey in search of his intended victim."

which violated the Fourth Amendment. The majority opinion epitomized its holding thus:

> [W]e believe that the Constitution neither prohibits nor requires retrospective effect. * * *
>
> Rather than 'disparaging' the [Fourth] Amendment we but apply the wisdom of Justice Holmes that '[t]he life of the law has not been logic: it has been experience.' Holmes, The Common Law ' (Howe ed. 1963) * * *
>
> In short, we must look to the *purpose* of the Mapp rule; the *reliance* placed on the Wolf doctrine; and the *effect* on the administration of justice of a retrospective application of Mapp. * * *
>
> All that we decide today is that *though the error complained of might be fundamental* it is not of the nature requiring us to overturn all final convictions based upon it. (Emphasis supplied)

Tehan v. United States, ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), refused retroactivity to *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which denied to the states that did not already proscribe it, the right to comment on the failure of the defendant to testify in a criminal proceeding. *Tehan* differentiated the self-incrimination protections of the Fifth Amendment from (i) the denial of the assistance of counsel, (ii) the burdening of the opportunity of indigents to appeal and (iii) the use of

coerced confessions, all of which had been given fully retroactive application, by pointing out that these latter three processes infected a criminal proceeding with *"the clear danger of convicting the innocent."* By contrast, it classed the privilege against self-incrimination not as an adjunct to the ascertainment of truth but as a protection of the right of an individual to be let alone. By application of the tripartite test of *Linkletter* — purpose, reliance and effect — the Court reasoned that a prospective application of *Griffin's* rule best served the interests of justice.

In a majority opinion by Chief Justice Warren, *Johnson v. State of New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) refused retroactive effect to *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) and *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which had defined and delineated the rights of those accused of crime during the arrest and investigatory period and had rendered inadmissible statements and confessions received when such accused were without counsel and had not been warned and advised of their rights. In the course of refining and applying *Linkletter*, *Johnson*[14] stated:

> We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. * * *

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[14]Which viewed *Escobedo* and *Miranda* as containing Fifth rather than Sixth Amendment rights.

> We also stress that the retroactivity or non-retroactivity of a rule is not automatically determined by the provisions of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. * * *
>
> Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the factfinding process at trial is necessarily a matter of degree. * * *
>
> We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial. (384 U.S. at 728-729)[15]

Assuming that there were past injustices which could have been averted by having counsel present at the time, Mr. Justice Brennan, speaking for the Court in

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[15]Three years later Mr. Justice Warren also delivered the opinion of the Court in Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969), which denied the application of *Miranda* exclusion standards to evidence that had been secured prior to the date that decision was announced in retrials which occurred subsequent to the date of *Miranda*. This opinion places strong emphasis on the reliance criterion.

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), refused retroactive application to *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and *Gilbert v. State of California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), which had rendered inadmissible in State and Federal prosecutions pretrial identification procedures handled in the absence of counsel. It is this opinion which announced the most frequently quoted epitome for retroactivity determinations:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. (388 U.S. at 297)

Since most other cases declaring a constitutional right to counsel have been granted full retroactive effect and since *Stovall* speaks of the *Wade* and *Gilbert* rights as ones which prevent dangers and unfairness in the fact-determining process and enhance the integrity and reliability of trials, it is of considerable moment to the case at bar that *Stovall* expressly gave the reliance and effect factors overriding significance in restricting the effect of the decisions to Wade and Gilbert alone.

Even though it is a short per curiam with two justices concurring on different grounds and two dissenting, *DeSteffano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed. 2d 1308 (1968) is perhaps the most significant precedent to the case at bar. There, the Court refused retroactive

application to *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which held that States cannot deny a request for jury trial in serious criminal cases, and to *Bloom v. State of Illinois*, *supra*, which held that the right to jury trial extends to trials for serious criminal contempts. Based upon the (a)(b)(c) test that had been distilled from prior decisions in *Stovall*, the Court reasoned *Duncan* should not be applied retroactively because:

> [I]n the context of the institutions and practices by which we adopt and apply our criminal laws, the right to jury trial *generally tends to prevent arbitrariness and repression.* As we stated in *Duncan*, 'We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.' (392 U.S. 633-634) (Emphasis supplied)

Of greater moment for Gosa's case was this application of retrospectivity standards to *Bloom:*

> The considerations are somewhat more evenly balanced with regard to the rule announced in Bloom v. State of Illinois. *One ground for the Bloom result was the belief that contempt trials, which often occur before the very judge who was the object of the allegedly contemptuous behavior, would be more fairly tried if a jury determined guilt.* Unlike the judge, the jurymen will not have witnessed or suffered the alleged contempt, nor suggested prosecu-

> tion for it. However, the tradition of nonjury trials for contempts was more firmly established than the view that States could dispense with jury trial in normal criminal prosecutions, and reliance on the bases overturned by Bloom v. State of Illinois was therefore more justified. Also, the adverse effects on the administration of justice of invalidating all serious contempt convictions would likely be substantial. Thus, with regard to the *Bloom* decision, we also feel that retroactive application is not warranted. (392 U.S. at 634) (Emphasis supplied)

On April 5, 1971, in the combined cases of *Williams v. United States* and *Elkanich v. United States, supra,* the Court refused retroactive application to *Chimel v. The State of California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), which denied the states the right to admit certain evidence seized incident to an arrest. In a four-judge majority opinion announced by Mr. Justice White,[16] the Court gave us this most current assay of how it applied the (a) part test of *Stovall:*

> Since . . . [*Linkletter*], we have held to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity

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[16]Justices Brennan and Marshall concurred in the denial of retroactivity in separate opinions. Mr. Justice Black concurred in the result, but on the ground that Chimell had been wrongly decided. Mr. Justice Harlan filed a lengthy and thought-provoking dissent in *Williams and Elkanich* and a doubtful concurrence in *Mackey, infra.*

for decisions construing the broad language of the Bill of Rights.

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.
>
> It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. (____ U.S. ____ at ____, 91 S.Ct. at 1191-1193)

Two other opinions, rendered the same day as *Williams* and *Elkanich*, dealt with the application of *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968), which prohibited the prosecution of gamblers who failed to register and pay a tax imposed by federal law on the grounds that the registration requirement violated Fifth Amendment privileges against self-incrimination. In *Mackey v. United States*, ____ U.S. ____, 91 S.Ct. 1160, ____ L.Ed.2d ____ (1971), four justices concluded that

Marchetti and *Grosso* should not be applied retroactively since there was no threat to the reliability of the fact-finding process involved in Mackey's trial for income tax evasion because of the evidentiary use of the *Marchetti-Grosso* proscribed wagering tax forms.[17] *United States v. United States Coin & Currency, supra,* involved forfeiture of property because of a refusal to file a self-incriminating form. It has been discussed above.[18]

This full, but hopefully not fulsome, development of the elements which form today's doctrine for court control of the reach of precedential effect of new pronouncements of constitutional rights in the field of criminal law, sets the stage for testing *O'Callahan* for this case. The tests will be applied in the (a)(b)(c) formula format of *Stovall* with due regard for the explanations and emphasis supplied to each criterion by subsequent decisions.

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[17]Again the Court was badly split in its reasoning. Considering that matters of procedure rather than substance were involved, Mr. Justice Harlan concurred. Justices Brennan and Marshall concluded that the bar of the Fifth Amendment did not extend to the enforcement of income tax laws applicable to those in the business of accepting wages, and that *Marchetti* and *Grosso* could be distinguished. Justices Black and Douglas dissented. *See also* United States v. Scaglione, ____ F.2d ____ 5*th* Cir. 1971) [No. 29279, July 9, 1971].

[18]On the same day, Hill v. California, ____ U.S. ____, 91 S. Ct. 1106, ____ L.Ed.2d ____ (1971), involving the retroactivity of *Chimel*, was decided. It was not expressly reasoned but merely relied on *Williams, supra.* That day also, the Court handed down United States v. White, ____ U.S. ____, 91 S.Ct. 1122, ____ L.Ed.2d ____ (1971), adhering to its decision of nonretroactivity announced in Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). This case likewise did not contain an explication of principles.

RETROACTIVITY — APPLICATION OF THE TESTS

(A) *Purpose of the New Standard.*

The purpose of O'Callahan may be stated in two ways. Affirmatively, it secured the constitutional right of grand jury presentment or indictment and petit jury trial to servicemen on active duty who were accused of crimes having no service connection.[19] Negatively phrased, *O'Callahan* denied military jurisdiction which exceeded the least possible power which the Constitution reposed in Congress and did so to avoid numerous incidents and functions of military justice considered less satisfactory to the determination of guilt than procedures available in civilian courts that would occupy the jurisdictional vacuum.

Under the affirmative statement of the test, *DeSteffano, supra,* particularly since it applies *Bloom* prospectively, predicts that the Supreme Court will hold *O'Callahan* should not be applied retroactively. In the words of the Court, the purposes of that decision were to require jury trials (a) in serious criminal cases because such jury trials generally tend *"to prevent arbitrariness and repression"* which even impartial judges might exhibit, and (b) in serious criminal contempt cases because juries could *"more fairly"* try alleged contemnors than could a judge who had been the object of the contemptuous act. The same purposes

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[19]The record before us does not disclose and no claim is advanced that Gosa's military trial was held away from the vicinage of the crime or that he was in any way impeded in securing other constitutional protections. We, therefore, do not reach these issues which were discussed in *Flemings, supra.*

underlie *O'Callahan*, even given its stern view of the faults of military courts which we detail below.

Obviously the negative statement gives a much broader sweep to *O'Callahan* and requires an independent analysis of purpose in the light of the Court's prior inquiries into the reliability of guilt determination — the fairness of the trial — the very integrity of the fact-finding process.

Candor, rather than even a hint of disrespect, compels the observation here that this particular facet of testing for retroactivity deals almost entirely in subjective judge-conceived notions based in no part on tangible evidence developed by an adversary process or otherwise, but rather upon feelings and concepts which are the product of each individual jurist's experiences and readings. Thus, with no deepseated assurance that the question ought not be certified to the High Court,[20] we reason to the following conclusions.

No analysis of the wider purpose of *O'Callahan* would be correct that did not weigh the critical ingredient of reliability of the fact-finding processes which it altered. Likewise, no test of this factor would be objective which overlooked the critical, indeed deprecatory, terms which the majority opinion applied to the general system of military justice.

Quoting from *United States ex rel Toth v. Quarles*, 350 U.S. at 22-23, it states:

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[20]A procedure available under 28 U.S.C.A. § 1254(3) (1966).

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

Then Mr. Justice Douglas' own words proclaim:

> A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved. * * * . . . expansion of military discipline beyond its proper domain carries with it a threat to liberty. (395 U.S. at 265)

> A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one

in military law, despite strenuous efforts to eliminate the danger. (395 U.S. at 363-364)

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subleties of constitutional law. (395 U.S. at 265)

A civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.[21]

As recently stated: 'None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.' Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969). (395 at 265)[21]

While commentators on both sides of the *O'Callahan* retroactivity issue have been critical of these statements,[22] and other authorities have stated more favor-

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[21]Footnote 7 in this quote refers to the entire system as one of "so-called military justice".

[22]*See e.g.*, Nelson and Westbrook, *supra*, n. 11, in favor of prospectivity, which states:

> Considered as a whole, the majority opinion is persuasive only to those who were already persuaded. Faced with a problem involving many complex variables and requiring the delicate balancing of competing interests,

able conclusions about the fundamental fairness of the system,[23] we hasten to assert that, as an inferior tribunal, we have no prerogative and it is not our purpose to dispute any of *O'Callahan's* language in the slightest degree. Our direct quotations here are solely for the purpose of demonstrating that, demeaning of military justice as these remarks may be, the opinion does not formulate its new constitutional restriction on congressional power for the purpose of preventing or undoing the conviction of innocent men. There was no determination that the UCMJ carried a clear danger of convicting the innocent, nor was it adjudicated that Congress had ordained a truth-determining process which lacked integrity or which as infected with procedures which substantially impaired the truth-finding function.

Civilian court bias which might tend to protect local

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the Court responds with dogmatic assertions about military justice. (55 Minn. L.Rev. 1, 63)

while the comment in Baylor L.Rev., *supra*, n. 1, which opts for retroactivity, observes:

Through a theme of the military as historical bandits of freedom for its members, the Court sets the tone for its construction.

(22 Baylor L.Rev. at 67)

[23] *See* Mercer v. Dillon, *supra;* Chief Justice (then Judge) Burger dissenting in United States ex rel Guagliardo & McElroy, 259 F.2d 927, 940, referred to the USMJ as having received universal recognition as "affording the basic elements of fairness"; Chief Justice Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L.Rev. 181, 188-189; Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A. L.Rev. 1240; Everett, *O'Callahan v. Parker, Milestone or Millstone in Military Justice*, Duke L.J. 853; *see also* Senator Ervin's anthology of significant instances in which courts-martial accorded procedural protections before civilian courts, 115 Cong.Rec. S 7174, 7175 (June 25, 1969).

citizens and their property from the troops was not put into the scales for comparison, nor was the worth of the military system tested at the general court-martial level where Gosa was tried. There the serviceman receives many procedural rights which are even more conducive to fact accuracy than most civilian forums accord.[24] The Court has told us that the extent to which other safeguards are available is also a pertinent consideration. As the history of Gosa's case amply demonstrates, general courts-martial receive several direct reviews of fact and law. The civilian staffed United States Court of Military Appeals, whose judges have fifteen-year tenure at a salary equal to our own, has both direct[25] and habeas review power.[26] Also, the federal courts have long been available for a collateral attack upon court-martial proceedings to secure basic constitutional guarantees and a full, fair hearing on all allegations raised.[27]

We conclude that *O'Callahan* ultimately decides no more on this subject than that there is a belief that a civilian court trial with grand and petit jury protections would tend to prevent arbitrariness and repression and be fairer. This belief is insufficient under *DeSteffano* standards to warrant retroactivity if other criteria point strongly to prospective application. Indeed, if the military court system as a whole were pro-

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[24]*See* Quinn, 15 U.C.L.A. L.Rev. 1240, *supra*, *n.* 23 and Comment, 22 Baylor L.Rev. 64, *supra*, *n.* 11.

[25]Art. 67 U.C.M.J. (10 U.S.C.A. § 867).

[26]*See* Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

[27]Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953). *See also* Noyd v. Bond, 395 U.S. 683, 89 S.Ct. 1876, 23 L.Ed.2d 631 (1969)

cedurally deficient, the attack and the holding in *O'Callahan* would certainly have condemned such lack of procedural and substantive due process equally with jurisdiction. Otherwise, the decision itself would stand as a denial of equal protection to those it left included in *O'Callahan* and, more importantly, in *Relford*. The latter case, according to its note 14 (91 S.Ct. at 658), extended the jurisdictional reach of military courts to about 80% of those servicemen who might otherwise have been excluded if a narrower definition of *O'Callahan* service connection had been adopted.

(B) *Justified Reliance on the Old Standard.*

We have been unable to find any authority or comment indicating that *O'Callahan* was foreshadowed in other opinions.[28] To the contrary, *Kinsella v. United States ex rel Singleton supra n. 9*, gave an interpretation to the power of Congress under the Constitution to constitute a system of military justice and to infuse it with jurisdiction which was clearly wide enough to encompass *O'Callahan*. The announcement there was:

> The test for jurisdiction, it follows, is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces'. (361 U.S. at 241)

No more need be said to demonstrate that this criterion clearly favors prospectivity.

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[28] *Cf.* Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed. 2d 1100 (1968).

(C) *Effect on the Administration of Justice of Retroactive Application.*

Here is another point that is free from doubt. If *O'Callahan* is held to be entitled to full retroactivity, the impact upon military justice, and upon the federal court system too, will be veritably staggering. In response to the request of this Court, the Department of the Air Force has advised that its court-martial systems have processed 475,349 cases since 1949 and although the sheer bulk of analysis prevented a case by case examination, a two-year sampling indicated to the Solicitor General of the United States that 5% would constitute a reasonable working hypothesis of the number of cases that could raise a retroactive *O'Callahan* issue. This calculates to be 23,767 trials in this branch of the service alone.[29] As the Court of Military Appeals has observed in *Mercer v. Dillon, supra,* peacetime court-martial jurisdiction over *O'Callahan*-type cases has been in existence since 1916. That opinion also pointed out that in the year 1968 there were 74,000 special and general courts-martial in the Army, the Navy and the Air Force. With a 55-year history, which includes several years in which the Armed Forces were swollen by the manpower demands of two major "world" wars, the total number of cases involved may reasonably be expected to number in the hundreds of thousands. Out of these possibilities, the numbers which could present issues still subject to review can only be rankly conjectured because of the variety of issues that could be raised. Again alluding to the language of *Mercer v. Dillon:*

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[29]Doubtless this has been somewhat restricted by *Relford.*

> The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans' benefits. Among the difficulties would be the necessity of reconstructing the pay grade that a member of the armed forces would have attained except for the sentence of the invalidated court-martial, a task complicated by the existence of a personnel system involving selection of only the best qualified eligibles and providing for the elimination of others after specified years of service.[30]

Indeed, it seems to this Court that a major justification for resolving its acknowledged doubts as to the correctness of the decision in this case in favor of prospectivity is the tremendous effect which a holding of retroactivity could produce solely within this Circuit, and only within the brief interim between the time our decision was announced and the time the Supreme Court could finally determine the merits of the case. An erroneous determination of retrospectivity could inundate this already overloaded system and the mili-

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[30] That same court also observed:

> In many of the courts-martial of earlier years, jurisdictional facts could have been developed on the record if there had been any reason to predict the need for doing so. The practical effect of voiding earlier convictions will often be to grant immunity from prosecution as a result of State statutes of limitations having run, witnesses having been scattered, and memories having been taxed beyond permissible limits.

tary forums with claims that would ultimately have to be reversed or dismissed. On the other side of the coin, if we err in holding for prospective application, while we acknowledge that we surely have added burdens to those wrongly imprisoned or deprived of their rights, the dimensions of the error would be infinitely less. The relative consequences to the administration of justice clearly indicate that we should pursue the more cautious course.[31]

CONCLUSION

We have set down in detail some will doubtless deem unnecessary the processes by which we have reasoned our decision. We have done so because the issue with which we have dealt is one of the greatest moment, involving as it does not only Gosa's freedom but potentially the freedom and property rights of many other citizens. If our reasoning is faulty, it is laid bare — its error will be plain. Using the best lights we are given, we believe it to be correct. We determine that the decision of the District Court that James Roy Gosa was not entitled to habeas corpus relief is correct and that decision is

AFFIRMED.

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[31] Judge Godbold's dissent suggests a middle ground tactic which would opt for retroactivity, then stay our holding pending High Court review. Such a course would have little if any ameliorating effect upon the anticipated impact of such a circuit ruling on the district courts, who would bear the entire brunt anyway during the relatively brief period between our decision and the Supreme Court's ultimate determination.

GODBOLD, Circuit Judge, dissenting.

I believe that the present state of the authorities requires us to hold that *O'Callahan v. Parker*, 395 U.S. 258, 23 L.Ed. 2d 291 (1969) is retroactive. Predicting how the Supreme Court as final arbiter may decide that issue is a luxury not available to us as an intermediate appellate court. We apply the law as it comes to us.

I agree with the majority's interpretation of *O'Callahan*. Once it is concluded that the decision rested upon lack of jurisdiction by the court martial in the sense of lack of adjudicatory power, then the action of other courts martial which in like circumstances purported to exercise adjudicatory power that we now know Congress could not constitutionally give them cannot be validated by applying standards which, in other contexts, have been applied to selectively depart from the normal and traditional rule of retroactivity.[1]

The "purpose-reliance-effect" test of *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967) is not a substantive end in itself but a tool of sorts for trying to find a way across areas not yet well charted. Judge Clark has spelled out some of the effects of retroactive appli-

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[1]The argument has been made that the question of prospective or retrospective application is not properly reached. *See* Judge Ferguson, dissenting in Mercer v. Dillon, 19 U.S.C.M.A. 264, 271, 41 C.M.R. 264, 271 (19):

> "Where jurisdiction is lacking, there can be no question of prospective or retrospective application, for when a court-martial proceeds without jurisdiction, its action is null and void. McClaughry v. Deming, 186 U.S. 49, 46 L.Ed. 1049, 22 S. Ct. 786 (1902). See also Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1880)."

cation of *O'Callahan*. They are so sweeping that all too easily the mind jumps to giving recognition to them by feeding them into a handy standard under which "effect" is a strong if not compelling factor. But the retroactivity cases since *Linkletter*[1A] have viewed retroactivity versus prospectivity in the context of considering the effect of a newly articulated rule of constitutional law upon past actions taken by courts of general jurisdiction which had adjudicatory power. In that context, upon application of the new rule, one learned by hindsight that such courts had acted erroneously. *DiStefano v. Woods*, 392 U.S. 631, 20 L.Ed. 2d 1308 (1968), which gave only prospective effect to *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491 (1968) (right to jury trial in all serious state criminal cases) and *Bloom v. Illinois*, 391 U.S. 194, 20 L.Ed. 2d 522 (1968) (right to jury trial in all state prosecutions for serious criminal contempts), is a case of that nature. None of the post-*Linkletter* cases has considered the question in the context of impact upon past actions taken by courts of special and limited jurisdiction, such as courts martial, where the effect of a choice of prospectivity will determine the adjudicatory power, in fact the very existence, of the court that has earlier acted.

> A court martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved * * * * To give ef-

[1A] Linkletter v. Walker, 381 U.S. 618, 14 L.Ed. 2d 601 (1965).

> fect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law.

Runkle v. U.S., 122 U.S. 543, 555-56, 30 L.Ed. 1167, 1170 (1887).

> A court-martial is wholly unlike the case of a permanent court created by constitution or by statute and presided over by one who had some color of authority although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected. But in this case the very power which appointed the members of and convened the court violated the statute in composing that court. It is one act, appointing the members of and convening the court, and in performing that act the officer plainly violated the law. Is such a court a valid court and the members thus detailed *de facto* officers of such valid court? Clearly not.
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> By the violation of the law [in constituting its membership] the body lacked any statutory authority for its existence, and it lacked,

> therefore, all jurisdiction over the defendant or the subject-matter of the charges against him.
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> * * * *
>
> [T]his particular court was not legally constituted to perform the function for which alone it was convened. It was therefore in law no court.

McClaughry v. Deming, 186 U.S. 49, 64-65, 46 L.Ed. 1049, 1056 (1902).

Linkletter went to the power of the Supreme Court itself to make rulings with purely prospective effect, a power theretofore not clearly recognized though from time to time adverted to. Mishkin, *The High Court, The Great Court and the Due Process of Time and Law*, 79 Harv. L. Rev. 56-59 (1965). I do not doubt that this court too now has the same power. But the issue for us in this case is whether we will push outward the limits of this newly articulated judicial power into an area in which not only has the Supreme Court not recognized its applicability but also in which the concepts, considerations and consequences upon judicial institutions of application of the power are all very different. If *Linkletter* is to be so extended, and with such massive consequences[2] it should be by the Supreme Court

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[2]Consequences are massive whether the decision is for retroactivity or prospectivity, and they do not become more or less so in either direction by mere characterization. My brothers point to the administrative and judicial problems which retroactivity would create. But prospectivity will leave in effect what all

itself and under standards promulgated by it.[3] This conclusion is, I think, buttressed by the considerations set out by Justice Harlan concurring in *Mackey v. U.S.*, ____ U.S. ____, ____, 28 L.Ed. 2d 404, 410 (1971) and *Elkanich v. U.S.*, ____ U.S. ____, ____, 28 L.Ed. 2d 388, 410 (1971) and dissenting in *Williams v. U.S., Id.*

Like my brethren, I am unsure of what the Supreme Court would decide, and I have attempted to avoid even a whisper of what I think the result should be. But I am firm in my view that at the Court of Appeals level we are not free in this case and at this time to selectively reject retroactivity. Therefore, I would reverse.

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agree will be many thousands of convictions with all their attendant consequences. And prospectivity will becloud established rules of the effect of judgments of courts of limited and special jurisdiction acting outside their powers.

If our conclusion were in favor of retroactivity we could stay our decision pending Supreme Court review, which would avoid the purely interim problems. In any event, interim problems arising between the time of a decision by this court and a decision by the Supreme Court on the merits, are hardly a proper foundation for a particular merits decision by this court.

[3]My position is analogous to, but somewhat more firm than that of Judge Weinstein in U.S. *ex rel* Flemings v. Chafee, ____ F. Supp. ____, ____, [No. 70-C-1267 (E.D.N.Y., July 19, 1971)]:

> "The mixture of theory and practical considerations in determining the extent to which new rules will be applied retroactively, particularly in this time of changing personnel and views on the Supreme Court, make reasonable predictions almost impossible. In such circumstances, bearing in mind that the traditional and standard rule is still one of retroactivity and that this is particularly true where jurisdiction in the sense of lack of power over the subject matter or person is involved, a *nisi prius* court should apply the traditional rule unless it is perfectly clear that the Supreme Court will not do so."

SUPREME COURT OF THE UNITED STATES

No. 71-6314

JAMES ROY GOSA, PETITIONER

v.

J. A. MAYDEN, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 19, 1972

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